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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 15, 1996

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-
Licensed Space Stations to Provide Domestic and International Satellite
Service in the United States, FCC 96-210, released May 14, 1996
(Notice of Proposed Rule Making in IB Docket No. 96-111)*

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Section 1.419 of the Commission's Rules, I enclose herewith for filing an original and four (4) copies of Orion's Comments in response to the Notice of Proposed Rule Making in the proceeding noted above.

Kindly stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,



Eric T. Werner

Enclosures

cc: Richard H. Shay, Esquire
April McClain-Delaney, Esquire
Thomas J. Keller, Esquire
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
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Amendment of the Commission's Regulatory)
Policies to Allow Non-U.S.-Licensed Space)
Stations to Provide Domestic and International)
Satellite Service in the United States)
)
and)
)
Amendment of Section 25.131 of the)
Commission's Rules and Regulations to)
Eliminate the Licensing Requirement for)
Certain International Receive-Only Earth)
Stations)
)
and)
)
COMMUNICATIONS SATELLITE)
CORPORATION)
Request for Waiver of Section 25.131(j)(1))
of the Commission's Rules As It Applies to)
Services Provided via the Intelsat K)
Satellite)

IB Docket No. 96-111

CC Docket No. 93-23
RM-7931

File No. ISP-92-027

TO: The Commission

COMMENTS OF ORION NETWORK SYSTEMS, INC.

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April 11, 1996

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TO: The Commission

COMMENTS OF ORION NETWORK SYSTEMS, INC.

ORION NETWORK SYSTEMS, INC. ("Orion"), by its attorneys, and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415 (1995), hereby submits its Comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rule Making ("Notice") in the proceeding captioned above.^{1/}

^{1/} *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, FCC 96-210, released May 14, 1996 (Notice of Proposed Rule Making in IB Docket No. 96-111) ("*DISCO II*").

I. INTRODUCTION AND SUMMARY

Orion supports the Commission's proposal to open up the U.S. marketplace to those non-U.S.-licensed satellites whose home market countries make reciprocal trade opportunities available to U.S.-licensed satellites. However, in light of the different spectrum and technological issues presented by mobile satellite service ("MSS") operations, Orion will limit its comments exclusively to fixed satellite services ("FSS").

The initiatives proposed in the Notice create incentives for foreign administrations to liberalize their satellite regulatory policies; such liberalization should result in lower prices and more innovative service offerings worldwide. The Commission, in proposing application of an ECO-Sat test, recognizes that the fruits of competition can only be achieved if trade in the global arena is "free and fair," and open on a reciprocal basis to all competitors. Orion generally supports the Notice's proposals, but believes some issues need greater clarification if the Commission's intended objectives are to be achieved.

First, Orion concurs that the earth segment licensing process provides the most appropriate vehicle for regulating the entry of foreign-licensed satellites and associated satellite services into the U.S. market. However, the Commission's proposal to require an earth station applicant to submit evidence demonstrating that its associated space station satisfies the FCC's financial and legal qualifications is fundamentally inconsistent with the Commission's stated intention to accept the sufficiency of foreign licenses. Moreover, to the extent that this requirement is intended to remedy the unfair and anticompetitive advantage foreign licensees already enjoy in the race to launch,^{2/} it utterly fails to achieve this goal.

^{2/} Orion and others have documented elsewhere the competitive benefits foreign licensees enjoy by virtue of the fewer regulatory hurdles that they face. Specifically, unlike U.S. applicants before the FCC, foreign applicants need not demonstrate their financial qualifications prior to advancing to ITU coordination. Thus, they can proceed to the ITU more quickly and thereby obtain preferred orbital locations.

Second, Orion supports use of the ECO-Sat test in the two-pronged formulation proposed in the Notice. While examination of the competitive opportunities available in system operator's "home market" (prong one) is a necessary component of the reciprocity analysis, it alone is not sufficient to guarantee free and fair trade. As discussed herein, the route market analysis (prong two) is essential to assure the overall integrity and reliability of the ECO-Sat standard. Orion likewise generally supports the Commission's proposals concerning the application of the ECO-Sat test; however, it believes the specific proposals relative to service and market segmentation, and information collection burdens, require further refinement.

Finally, Orion shares the Commission's concerns relative to the dominant position of the Intergovernmental Satellite Organizations ("ISOs"), Intelsat and Inmarsat, and the capacity of these organizations (and their privatized progeny) to exercise anticompetitive market power on a global basis. Orion believes that the ubiquitous nature of the ISOs, and the uncertain status of reform efforts, raise a host of difficult issues that make the question of liberalized market access for these entities extremely complex. Accordingly, Orion urges the Commission to set aside these issues at present, and to consider them in a separate rule making devoted exclusively to them. However, to the extent the Commission is unwilling to accept such a deferral, Orion generally supports the Commission's proposals relative to the ISOs. Specifically, while the ISOs possess formidable, artificial advantages that are an anathema to a genuinely competitive marketplace, Orion recognizes that, as creatures of treaty, they enjoy statutory protection that could make application of the ECO-Sat test inappropriate at this time. However, the emergence of competitive service providers in the ISOs' historical markets over time may undermine the public interest basis for this

forbearance. Accordingly, Orion urges the Commission to monitor liberalization developments closely, and to schedule a date certain at which time it will revisit this issue.

As to the ISOs' subsidiaries, affiliates, and successors, Orion shares the Commission's desire for "genuinely procompetitive privatization"^{3/} and believes that any newly-privatized entities spawned by the ISOs should be placed on an equal regulatory footing with other private system operators and subject to evaluation under the ECO-Sat standard from their inception.

II. REGULATION OF ENTRY VIA THE EARTH SEGMENT LICENSING PROCESS IS APPROPRIATE, BUT THE COMMISSION MUST HARMONIZE A CRITICAL. ANTICOMPETITIVE INCONSISTENCY IN ITS PROPOSAL

As an initial matter, Orion agrees that the licensing process for U.S. earth-segment equipment provides the best mechanism for regulating access to the U.S. market and is an appropriate context for application of the ECO-Sat test. Principles of comity among sovereign nations dictate that the Commission afford full faith and credit to the licensing decisions of foreign administrations: The Commission cannot second-guess or question the legitimacy of satellite space station licenses awarded by a foreign administration without inviting foreign administrations similarly to challenge U.S. satellite operators' licenses awarded by the Commission. In addition, as the Commission recognizes, to require an operator already licensed by its "home" administration to obtain a separate space station license in each foreign market which it desires to serve would be inefficient, duplicative, and an impediment to expanding international free trade in the satellite arena.^{4/}

^{3/} Notice, slip op. at 25 (¶ 73).

^{4/} See Notice, slip op. at 9 (¶ 14). Similarly, foreign administrations should fully accept licenses issued by the FCC and should not impose a burdensome and duplicative licensing requirement on U.S. satellite operators seeking to enter their markets. Accordingly, in keeping with the principles of reciprocity at the core
(continued...)

However, the proposed requirement that an earth station applicant submit an exhibit demonstrating "that the non-U.S. satellite meets all Commission technical, financial, and legal requirements for that service,"^{5/} squarely conflicts with this stated intention "to accept the sufficiency of satellite licensing procedures abroad -- as we expect [foreign administrations] to accept the sufficiency of our procedures." Notice, slip op. at 9. In essence, it pays only lip service to the foreign licensing scheme by simply moving the entry barrier to another position in the regulatory process, and it invites foreign administrations to do the same to U.S.-licensed operators.

Moreover, Orion has previously explained to the Commission how foreign-licensed operators, unencumbered by FCC regulatory demands (most notably, the financial qualifications requirement) can speed past U.S. applicants in the race to the ITU to lay claim to the most desirable orbital locations.^{6/} To the extent that the Commission's proposed requirement evidently attempts to remedy this problem, it is entirely ineffective.^{7/} As Orion and others contended in the *DISCO I* proceeding, the most appropriate response to this

4/ (...continued)

of the ECO-Sat test, the Commission should maintain sufficient flexibility to subject non-U.S.-licensed operators to the same sort of regulatory standards that their "home" administrations place upon U.S. licensees seeking to enter their markets.

5/ Notice, slip op. at 21 (¶ 61) (footnote omitted).

6/ See Comments of Orion Network Systems, Inc., in IB Docket No. 95-41, filed June 8, 1995, at 8 ("Orion *DISCO I* Comments").

7/ Moreover, such a requirement would also fail to satisfy the underlying objectives of the FCC's financial qualification requirement. In the *DISCO I Report and Order*, the Commission concluded that one-stage financial processing was necessary for all U.S. FSS applicants to "prevent . . . entities without the requisite financial resources from tying up scarce orbital resources" *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, FCC 96-14, released January 22, 1996, 61 FED. REG. 9946 (Mar. 12, 1996), slip op. at 14 (¶ 41), petition for reconsideration pending [*"DISCO I Report and Order"*]. Requiring an earth station applicant to file an exhibit demonstrating compliance with FCC regulation in connection with a system that has already been submitted to the ITU for coordination does absolutely nothing to safeguard against the possibility that the foreign applicant is warehousing the spectrum.

problem is for the Commission to preserve the two-stage financial qualification requirement and apply it uniformly to all FSS applicants, international and domestic. Orion *DISCO I* Comments, *supra* note 6, at 6-9.

III. ORION SUPPORTS USE OF THE TWO-PRONG ECO-SAT TEST, ROOTED IN THE PRINCIPLE OF SERVICE-TO-SERVICE RECIPROCITY, TO GOVERN U.S. MARKET ENTRY BY NON-U.S.-LICENSED SATELLITE SYSTEMS

Orion agrees that the Commission should not retroactively examine licenses already granted for use of non-U.S. satellite systems.^{8/} However, Orion strongly supports a prospective, uniform application of the ECO-Sat test to all non-U.S.-licensed systems.

With respect to the substance of the test, Orion shares the Commission's view that it is most appropriate first to examine the competitive opportunities in the coordinating administration's market, the so-called "home" market for the foreign system. As the Commission correctly noted, this home administration customarily undertakes international coordination of the system and generally derives most of the economic benefits from the operation of the system. *Id.*, slip op. at 11 (¶¶ 23-24). Accordingly, it also generally possesses the greatest ability to influence the manner in which the services are provided and the system is operated.

^{8/} The Commission correctly observes that such a review could engender undesirable service disruptions. Notice, slip op. at 10 (¶ 20). However, the Commission's assertion that it would be unfair and burdensome to apply the standard to applicants who filed prior to the Notice, *id.*, slip op. at 11, is not equally clear. As the Notice acknowledges, the ECO-Sat test at the core of the Notice derives substantially from the effective competitive opportunities ("ECO") test that emerged from the *Foreign Carrier Entry Order*. *Id.*, slip op. at 3 (¶ 2); *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873 (1995) [*"Foreign Carrier Entry Order"*]. The *Foreign Carrier Entry Order* was released last November, almost six months before the release of the Notice. Moreover, as the Commission observes in the Notice, parties commenting in the *DISCO I* proceeding more than a year ago were urging a market entry analysis for non-U.S. satellite systems that applied principles similar to those cultivated in the *Foreign Carrier Entry* proceeding. See Notice, slip op. at 5 & n.13. Accordingly, pending applicants who filed within the last year can hardly claim surprise or prejudice from application of the ECO-Sat test proposed in the Notice.

However, Orion also agrees that the first prong, while necessary, is not sufficient to assure the existence of effective competitive opportunities in the markets that may be most relevant for the foreign system. The "administration of convenience" concern identified by the Commission, *id.*, slip op. at 12 (¶ 26), becomes especially grave when viewed in conjunction with the emerging trend toward ISO privatization. The potential exists for newly-privatized ISO "spin-offs" to manipulate the ECO analysis by seeking licensing through an "open market" administration while preserving the preferential relationships their predecessor(s) may have had with other administrations that do not afford reciprocal access to U.S. operators.^{9/} In such circumstances, merely testing the accessibility of the home market would not adequately ensure that U.S.-licensed entities enjoyed meaningful effective competitive opportunities *vis a vis* the foreign licensee in other overseas markets. Thus, to preserve the integrity and reliability of the ECO analysis, attention must also be devoted to the route markets where the transmissions carried by the operator in question originate or terminate.^{10/}

^{9/} In this case, the Commission's departure from the ECO test of the *Foreign Carrier Entry Order* is most apt. See Notice, slip op. at 13 (¶ 29).

^{10/} Conducting such a route analysis might prove to be a complex undertaking in view of the variegated range of competitive opportunities and restrictions among overseas administrations and even among individual service categories within individual administrations. For example, one route administration might permit market access for providers of direct-to-home ("DTH") services, but deny access for Very Small Aperture Terminal ("VSAT") services, while another might permit VSAT services but refuse to permit them to be interconnected. Compiling the records necessary to document such restrictions among foreign administrations could be administratively burdensome for the Commission, and resolving such disparities in a rationale manner could significantly increase the processing time and lead to licensing delays. Some delay in the decision making process may be unavoidable if the Commission is to assure effectively the availability of opportunities for U.S. operators overseas. See, e.g., *Vision Accomplished*, 11 FCC Rcd 3716 (1995). However, the Commission could significantly reduce its record-keeping burden by requiring the foreign satellite operator to supply a translated compilation of the satellite service regulations of its home administration and for each route administration it serves, or by coordinating an exchange of regulations on an administration-to-administration basis.

With respect to the possible variations to the two-pronged framework which the Commission advanced in the Notice, *id.*, slip op. at 13 (¶¶ 30-31), Orion generally supports incorporating into the "home market" analysis an ownership component which would examine the accessibility of the markets of each of the major investors in the foreign-licensed system. Such an examination follows logically from some of the same financial considerations that justify analysis of the coordinating administration's market: Major investors possess the most significant financial interests in an operator and customarily enjoy a proportionately greater share of the revenues.

By contrast, Orion believes that truncating the ECO-Sat test into a one-step analysis turning upon whether a "critical mass" of relevant foreign countries affords competitive market access to U.S. operators would be both less practical and less effective than the two-prong formulation. In particular, application of the notion of a "critical mass" would be fraught with difficulty. First, it sets up an "all or nothing" criterion that may lack sufficient flexibility to respond to individual factual circumstances. Second, it begs several critical and difficult questions, such as "how many countries constitute a relevant mass?"; "is it the same in every case?"; "which countries are relevant for counting purposes and according to what criteria?" In essence, the proposal resurrects the very problems which so vexed negotiations in the World Trade Organization ("WTO") negotiations in April of this year.^{11/} The two-prong approach provides a more certain standard that can be appropriately tailored to an individual case.

^{11/} See, e.g., *U.S., EU Officials Meet to Discuss WTO Talks*, Telecommunications Reports, April 15, 1996, at 19; *Industry Wants Satellite Issues Off World Trade Organization Agenda*, Communications Daily, April 17, 1996, at 8-9.

Orion is, however, concerned with the Commission's proposed method for distinguishing among appropriate service categories for the ECO-Sat analysis, as well as its stated intention to draw no distinction between international and domestic service. *Id.*, slip op. at 14-15 (¶¶ 33-34, 35). Service-to-service reciprocity should form the touchstone for the ECO-Sat analysis. While sympathetic to the Commission's evident desire to simplify the analysis, Orion believes that the proposed "rule of thumb" -- to conduct an access analysis based only on broad service categories (*e.g.*, DTH, FSS, and MSS) without regard to relevant subcategories (*e.g.*, VSAT, voice, video, and data) -- could be less effective at creating incentives for foreign administrations to open their markets fully. In order to encourage such unrestricted market access across the range of services, foreign satellites should not be permitted to engage in any service subcategory that would be closed to U.S. entities in the foreign operator's relevant home and route markets. Such an analysis could be somewhat complicated; however, the more focused approach will ultimately serve the marketplace better.^{12/}

The same reasoning also applies to the domestic/international service dichotomy. For example, some administrations, particularly in the Asia/Pacific Region, could deny access to U.S. FSS providers for the purposes of domestic service, but permit these same operators to provide international FSS service. As the Commission correctly recognizes, foreign operators licensed by such administrations should not be permitted to offer domestic service

^{12/} For example, DTH (*i.e.*, "true DBS") service and high power Ku Band FSS service are categorically distinct from one another under the Commission's model; however, both are capable of providing direct to subscriber video programming and, thus, are functionally similar. Under the Commission's model, would the Commission permit a foreign-licensed operator to provide FSS Ku Band video service in the U.S. (in competition with U.S. DBS operators) if the operator's home and route markets were closed to U.S. DTH operators but open to FSS operators providing other, non-video, services? Evidently so. And yet this outcome creates just the sort of unfair advantage for the foreign operator that the ECO-Sat test is intended to avoid.

in the United States. *Id.*, slip op. at 15 (¶ 35).^{13/} However, precluding such operators from offering both international and domestic service in the U.S. market may create the counter-productive incentive for such foreign administrations to retaliate by closing their markets to U.S. international service providers resulting in a net loss for competition. Orion agrees that the opening of both types of service to U.S. satellite operators is the ultimate goal; however, the more tailored and measured response of strict reciprocity will most effectively achieve that objective.

Finally, Orion supports the Commission's proposal to examine both *de jure* and *de facto* barriers to foreign market access: A complete picture of the legal and practical obstacles in place in a foreign market is absolutely critical to a full and accurate understanding of the competitive landscape. However, Orion urges the Commission to place the burdens related to such an inquiry where they most appropriately belong. The Commission's proposal to require U.S.-licensed operators to file written reports with the Commission disclosing the foreign jurisdictions where they have obtained access rights and describing the services they are permitted to provide imposes a burdensome and intrusive obligation on U.S. operators that may be unnecessary.

The Commission quite appropriately recognizes in the Notice "that applicants wishing to communicate over non-U.S. satellite systems should bear the burden of demonstrating that

^{13/} The Commission's action in *DISCO I* does not compel such access. Although in that proceeding the Commission clearly manifested a preference for unpartitioned service markets, the *DISCO I Report and Order* operated only with respect to classes of U.S.-licensed satellite system operators subject to the FCC's direct jurisdiction. Tearing down such artificial classifications makes good sense in an environment where the Commission can exercise its oversight to ensure fair competition among its regulated entities. However, non-U.S.-licensed operators present the altogether different problem of anticompetitive conduct beyond the immediate jurisdiction of the agency. While the Commission may be unable to attack such conduct directly to the extent it occurs outside U.S. territorial boundaries, it does have the authority and responsibility to ensure that such conduct is not permitted into the U.S. marketplace.

none of the countries they intend to serve from the U.S. earth station maintain *de jure* barriers to U.S.-licensed satellite operators." Notice, slip op. at 15 (¶ 39). Following from this premise, it simply passes reason why the U.S. operator should be impressed into service to assist a foreign competitor's entry into the U.S. market. Rather, the burden should be on the earth station applicant -- in cooperation with the foreign service provider -- to compile and submit to the Commission the documentation necessary to substantiate the existence of open market access in the relevant home and route markets.^{14/} Such evidence could consist of such materials as official translations of the relevant statutes and regulations of the foreign administrations reflecting the absence of legal barriers to entry; copies of administrative licensing orders from the foreign administrations demonstrating that U.S. operators have been authorized to conduct business, and describing the satellite services they have been permitted to provide; and copies of publicly available marketing materials used by U.S. operators in foreign jurisdictions.^{15/} Placing the burden on the proponent of the service also eliminates the thorny problem of preserving the confidentiality of U.S. operators' proprietary business information.

The appropriate role for the U.S. operator should arise in the second stage of the analysis. After the applicant and foreign operator have advanced a *prima facie* showing that

^{14/} Although earth station applicants, in certain cases, may not have immediate access to the information necessary to demonstrate such effective competitive opportunities in overseas jurisdictions, the foreign satellites that will serve such earth stations have both the access to the necessary information, and the motivation -- commercial self interest -- to make it available to the applicant. Indeed, just as U.S. operators may be expected to be more familiar with the regulatory rights and opportunities arising under the Communications Act of 1934 and its amendments and related statutes, foreign operators may be expected to have better information than U.S. operators doing business overseas when it comes to their own home administrations.

^{15/} The Commission already publishes an official record of its actions including adjudications, licensing orders, rule making orders, and policy statements, which are readily available to the public. The complete text of the Commission's rules and regulations are also available. Accordingly, to the extent that a foreign operator desires to enter the U.S. market, it is not an unreasonable to request that its sponsoring administrations provide similar information.

reciprocal competitive opportunities exist in the relevant foreign jurisdictions, U.S. operators should be afforded the chance to come forward with rebuttal information concerning the existence of barriers, *de jure* and *de facto*, that they have experienced in any of the markets. This type of proceeding provides a particularly appropriate vehicle within which to conduct the Commission's proposed *de facto* inquiry because evidence of such barriers will largely be experiential and anecdotal in nature.

IV. THE COMMISSION SHOULD CONSIDER THE COMPLEX ISSUES RELATIVE TO ISO ENTRY INTO THE U.S. MARKET IN A SEPARATE RULE MAKING DEVOTED EXCLUSIVELY TO THAT ISSUE

In the Notice, the Commission correctly acknowledges that the ISOs, Intelsat and Inmarsat, and their signatories such as COMSAT,

enjoy certain privileges and immunities that may provide them with competitive advantages over competing satellite service providers. For example, they hold tax free status and may be exempt from national regulations, and competition laws. They also have established dominant positions in the global market by virtue of their size and of the fact that, in general, their members are the primary if not exclusive providers of fixed and mobile maritime services in most major national markets.

Notice, slip op. at 22 (¶ 62). Moreover, as demonstrated by Columbia Communications' recent experience with Intelsat, the ISOs have no reservations about exercising their advantages in an anticompetitive manner.^{16/} The formidable competitive advantages that the ISOs enjoy are anathema in the competitive world marketplace that the Notice envisions because they arise not from the ISOs' own competitive efficiency, but rather by dint of the artificial protections and preferred status that these organizations have historically enjoyed and, despite discussions toward this end, these organization have not undertaken meaningful

^{16/} See, e.g., *Intelsat Board Votes Against Coordination With Columbia for Atlantic Slot*, Communications Daily, April 17, 1996, at 9-10.

reform to abandon these advantages. Orion submits that any process to liberalize U.S. market access for these entities must also confront the challenge of unwinding the deliberately created dominance of the ISOs and sorting through the uncertain patchwork of reform and privatization efforts now underway. These challenges present many difficult issues that warrant individualized attention. Accordingly, Orion urges the Commission to take up the question of liberalized U.S. market access for ISOs in a separate rule making devoted exclusively to resolving the many issues raised by such a proposal.

However, in the event the Commission believes that resolution of the ISO market entry question in the instant proceeding is appropriate, Orion offers the following observations. The Commission has requested comments on three issues: (1) whether it should apply the ECO-Sat route market analysis prospectively to ISO earth station applications for expanded facilities; (2) what sort of treatment it should afford to the privatized affiliates, subsidiaries, or successors of the ISOs; and (3) whether the ISOs, through COMSAT, should be permitted to provide purely domestic service in the United States.

With regard to the first issue, Orion agrees that the need to avoid disruptions in existing service may make it inadvisable to apply the ECO-Sat route market analysis to the ISOs until such additional capacity has entered the market to overcome these concerns. However, as the effects of the Notice's proposals take hold in the market and competition grows; as the ISOs continue to privatize and change; and as new alternative providers capable of serving the countries and providing the distress and safety services noted by the Commission enter the market, the rationale for forbearing from the route market analysis may dissipate considerably. The Commission must remain engaged on this issue.

Accordingly, Orion urges the Commission to revisit this issue on a regular schedule, perhaps every two years, to reassess the state of competition in the global satellite market and reevaluate whether application of the route market analysis has become appropriate.

Clearly, however, to the extent that the ISOs, and their participating members, continue to clutch the advantages associated with their special status, they should be permitted to do so only for the services that they now provide. The applicable treaties and statutes should be strictly construed to permit the ISOs to perform only their intended functions: The ISOs should not be permitted to expand their business opportunities until they have restructured or otherwise have abandoned their privileged and protected status. In this respect, Orion agrees with the Commission that only "genuinely procompetitive privatization"^{17/} by the ISOs should entitle them to regulatory relief.

While much discussion has been devoted to the possibility of ISO privatization and/or reform, no consensus has formed relative to the nature and rights of any such ISO subsidiaries, affiliates or successor entities. While it is quite possible that such restructuring activities will result in a fair and level playing field for all market entrants, the contrary is equally possible. In order to ensure that such ISO "spin-off" entities will not enjoy an unfair advantage over existing private operators due to their lineage (*i.e.*, to guarantee that they will be genuinely procompetitive), Orion strongly agrees that any such entities should undergo the complete ECO-Sat analysis before being authorized to provide service to, from, or within the U.S. market.

The foregoing principles also guide Orion's response to the Commission's specific inquiry concerning whether the ISO's, through COMSAT, should be permitted to provide

^{17/} Notice, slip op. at 25 (¶ 73) (emphasis added).

purely domestic service within the United States. In its comments in the *DISCO I* proceeding, Orion made the point that, as the U.S. signatory to Intelsat and Inmarsat, COMSAT enjoys both treaty-based privileges and immunities and other indirect benefits not available to the other satellite competitors. Orion *DISCO I* Comments, *supra* note 6, at 4. As discussed above, the Commission, in the Notice, acknowledged this fact, and noted the concern of Orion and others that these advantages would enable the ISOs and their member organizations to compete unfairly.^{18/}

These concerns remain as valid now as they were a year ago. Consistent with the reasons noted above, COMSAT should not be permitted to leverage its special advantages in to new market sectors not encompassed by the ISO treaties until truly competitive restructuring has taken hold. To date, such reform has not occurred. Once steps have been taken to create a genuinely procompetitive environment, COMSAT, like any other ISO affiliate, should be permitted to utilize Intelsat and Inmarsat capacity to provide U.S. domestic service subject to application of the ECO-Sat test.

^{18/} With respect to COMSAT in particular, Orion observed

Such advantages include immunity from antitrust and competition regulation, relief from Part 25 licensing procedures applicable to all other domestic satellite and separate system licensees, Presidential appointees on COMSAT's Board of Directors (i.e., a direct communications link to the Administration), the ability to raise financing at rates not available to the private sector and relief from the regulatory and spectrum fees paid by all other satellite licensees.

COMSAT could also potentially leverage its signatory status to cross-subsidize domestic service offerings through international service offerings. The separate systems have long advocated stricter FCC scrutiny of COMSAT concerning structural separation issues (e.g., separating competitive commercial functions from monopoly and signatory functions) and other regulatory safeguards. Such issues become increasingly important if COMSAT seeks to provide not only ancillary domestic services, but to enter the domestic marketplace as a special "treaty-exempt" competitor.

Orion *DISCO I* Comments, *supra* note 6, at 4-5.

In the alternative, the COMSAT should be permitted such expanded access to the U.S. market only after satisfactorily demonstrating that such expanded access would not unfairly disadvantage existing U.S. competitors. In this regard, Orion would support the Commission's proposal to predicate U.S. domestic service using ISO capacity upon a showing that U.S. operators have access to provide analogous services in the markets of the particular ISO's member countries representing at least the minimum level of concurrence required for any official action of the organization. *See Notice*, slip op. at 23 (¶ 67).

V. CONCLUSION

Orion supports the FCC's effort to expand competitive opportunities for foreign satellite system operators in the U.S. market and for U.S. satellite licensees overseas. Orion agrees that the earth station licensing process, rather than redundant space station licensing, affords the most effective means of implementing the Commission's proposals. However, Orion submits that the proposal to require earth station applicants to demonstrate that the related foreign space station complies with the FCC's financial and other non-technical qualifications requirements is inconsistent with the Commission's proposal to accord full credit to foreign licensing decisions and must be corrected.

Orion also supports the ECO-Sat test proposed by the Commission, and agrees that both the home market and route market prongs of the analysis are necessary to achieve Commission objectives. Finally, Orion submits that the issues involved in the question of expanded ISO entry into the U.S. market are more appropriately addressed in a separate rule making proceeding. Nevertheless, while accepting the Commission's reasoning that application of the ECO-Sat regime to ISOs may not be appropriate at the present time, Orion believes that anticipated changes in the marketplace, including ISO privatization and

increasing competition, may undermine the Commission's rationales for forbearance in the future. Accordingly, in the event it decides not to defer the issue to a separate proceeding, the Commission, should set a time to revisit the issue.

Moreover, the rationales for shielding the ISOs from the ECO-Sat test do not justify similar protection for their affiliates, subsidiaries or privatized successors. The new entities should immediately be subject to the ECO-Sat test to ensure that they will not perpetuate the unfair anticompetitive advantages of their predecessors. Pending further reform or privatization demonstrating that they have abandoned their artificial marketplace advantages and are prepared to compete fairly, the ISOs and their signatory members should not be permitted to expand their markets to include U.S. domestic service. At a minimum, such expanded access should only be permitted pursuant to a showing that an appropriate minimum threshold of the ISO's member countries permit similar access to U.S. operators in their home markets.

Respectfully submitted,

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Date: July 15, 1996

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary for the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that I have, this date, sent copies of the foregoing "Comments of Orion Network Systems, Inc." to each of the following by First Class United States mail, postage prepaid:

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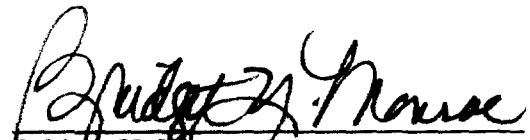
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